90-134

Supreme Court, U.S.
FILED
JUL 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

THOMAS RUSSELL COONEY AND
LORA JOHN COONEY,

Petitioners,

v.

CHRIS J. WHITE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WYOMING SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole question presented by this Petition is whether a state official who caused a perjured petition to be issued, knowingly used the perjured petition to obtain an arrest warrant, and caused a probationer to be arrested and incarcerated without bail or preliminary hearing for thirty-eight days, is entitled to absolute immunity from liability under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners, as plaintiffs below, commenced this action with a complaint filed on May 14, 1987, in the District Court Fifth Judicial District, Park County, Wyoming. In their Complaint the Petitioners asserted against all defendants a cause of action under 42 U.S.C. § 1983 for damages caused by the deprivation of the Petitioners' rights, privileges and immunities guaranteed under the United States Constitution. The defendants below were Respondent Chris J. White, Robert Mayor, Park County, Wyoming, the State of Wyoming and the Wyoming Department of Probation and Parole. The Petitioners do not believe that any of the defendants below except Respondent Chris J. White have any interest in the outcome of this Petition.

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I. DECISION BELOW

The initial decision on the question presented was rendered by the Honorable John T. Dixon, District Judge, Fifth Judicial District, Park County, Wyoming, and is submitted to the Court in the Appendix beginning at page 1. That opinion was appealed to the Wyoming Supreme Court, and its opinion, which has not yet been officially reported, is set forth in the Appendix beginning at page 35.

II. JURISDICTION

The Wyoming Supreme Court's decision on the question presented was issued on April 18, 1990. (Appendix beginning at p. 35). The Petitioners ask this Court to review the portion which affirms the dismissal of the damage claims against Respondent Chris J. White under 42 U.S.C. § 1983, on the grounds that Respondent White is entitled to absolute immunity. The decision of the Wyoming Supreme Court involves claims under 42 U.S.C. § 1983 and rights, privileges and

immunities guaranteed under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and therefor this Court has jurisdiction to review that decision under 28 U.S.C. § 1257.

Section 1983, Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [42 U.S.C. § 1983].

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a

redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. STATEMENT OF THE CASE

A. Proceedings Below.

The initial complaint filed by the Petitioners in the District Court, Fifth Judicial District, Park County, Wyoming, asserts a claim against each of the defendants below, including Respondent Chris J. White, for damages under 42 U.S.C. § 1983 for deprivation of the Petitioners' rights guaranteed by the United States Constitution. All of the defendants moved

to dismiss pursuant to Rule 12(b)(6) of the Wyoming Rules of Civil Procedure (which is identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure). With an opinion letter dated November 4, 1987 (Appendix at p. 1) the trial court issued its opinion on the issues raised by the defendant's motions to dismiss. Included within that opinion was the trial court's decision that all the claims asserted against Respondent Chris J. White under 42 U.S.C. § 1983 must be dismissed because Mr. White was entitled to absolute, quasi-judicial immunity from any such liability. In doing so, the trial court wrote:

> The only conclusion that the Court can reach, based on the authority cited, is that the Plaintiffs' First Cause of Action, based on § 1983, fails to state a claim against Defendant White. The decision to bring a revocation petition is one that falls within the "quasi-judicial function" of a prosecutor and, thus, total immunity and not merely a qualified or limited immunity exists. (Appendix at 12.)

The trial court certified its order on the defendant's motion to dismiss under Rule 54(b), W.R.Civ.P., and the Petitioners appealed a number of those issues to the Wyoming Supreme Court, including the dismissal of the Section 1983 claims against Respondent White. With its opinion dated April 18, 1990 (Appendix at p. 35) the Wyoming Supreme Court affirmed the trial court's dismissal of the Section 1983 claims against Respondent White. In doing so, the court said:

> Viewing deputy county Attorney White's challenged activities in this perspective, we reject the Cooneys' argument that his challenged activities are not the functional equivalent of the prosecutor's role as an advocate in a criminal proceeding. We are convinced that his challenged activities are advocatory and "intimately associated with the judicial phase of the criminal process" and, therefore, "are functions to which the reasons for absolute immunity apply with full force."

Quoting Imbler v. Pachtman, 424 U.S. 409,

430, 96 S.Ct. 984, 995, 47 L.Ed.2d 128, 143 (1976). (Appendix at p. 67.)

The issue that the Petitioners ask this Court to review, then, was initially presented to the trial court and specifically decided by both the trial court and the Wyoming Supreme Court.

B. Statement of the Facts.

The decisions of the courts below were made on motion to dismiss, and therefore the factual basis for those decisions was taken from the allegations of the Petitioners' complaint, and those facts judicially noted by the Wyoming Supreme Court. This statement of facts is taken almost directly from the opinion of the Wyoming Supreme Court. (Appendix beginning at 37).

In 1985, Petitioner Thomas Cooney pled guilty to writing bad checks in Park County, Wyoming. Upon accepting his guilty plea, the district court sentenced Mr. Cooney to five years supervised probation, which required, among other things, that he stay

in regular contact with officers of the Wyoming Department of Probation and Parole. During the course of his probation, Mr. Cooney lived with his wife and family in Riverton, Wyoming, where his parole officer was Cindy Johnson. In September of 1985, Mr. Cooney requested permission from the Department to move with his wife and child to Baroil, Wyoming, because of a change in his job. Parole Officer Cindy Johnson granted Mr. Cooney that permission, and told him he would be contacted by the parole officer in Rawlins, Wyoming, for continued supervision under the terms of his probation.

The Petitioners moved to Baroil, Wyoming, in October 1985, and Parole Agent Cindy Johnson forwarded Mr. Cooney's file to Tracy Reinke, a probation officer in Rawlins, Wyoming. Unknown to the Petitioners, however, in doing so Cindy Johnson erroneously advised Tracy Reinke that Mr. Cooney and his family were now

living in LaBarge, Wyoming, instead of Baroil. Because of this erroneous advice, Ms. Reinke returned the Cooney file to Ms. Johnson in Riverton and instructed Ms. Johnson to forward it to the Department office in Evanston, Wyoming, the office with jurisdiction over probationers living in LaBarge, Wyoming. On October 21, 1985, Ms. Johnson mailed the Cooney file to the Department office in Evanston where it was assigned to Robert Mayor. After receiving the file, Mr. Mayor made unsuccessful attempts to locate Mr. Cooney in LaBarge because the Cooneys continued to reside in Baroil, Wyoming.

In the meantime Mr. Cooney, still unaware of Ms. Johnson's errors, contacted Ms. Johnson several times by telephone inquiring about the contact he expected to receive from the probation officer in Rawlins. Based on those calls, Ms. Johnson filed reports verifying Mr. Cooney's compliance with the terms of his probation

in October and November of 1985. During December of 1985, Mr. Cooney telephoned the probation office in Rawlins to contact Ms. Reinke about continued supervision of his probation.

In mid-January, 1986, Mr. Mayor contacted Ms. Johnson to inform her that he could not locate Mr. Cooney in his area. Unexplainably, Ms. Johnson told Mr. Mayor that Mr. Cooney had relocated to LaBarge, Wyoming, in October of 1985, and that she had not heard from him since that time. This erroneous information prompted Mr. Mayor to call Respondent Chris White on January 24, 1986. Mr. White was then the deputy county attorney for Park County, Wyoming. Mr. Mayor advised Mr. White that Mr. Cooney had not been in contact with his probation officers as required by the terms of his probation, and that he had moved from Riverton, Wyoming, without permission from his probation officer. Mr. White asked Mr. Mayor to prepare a petition to have Mr.

Cooney's probation revoked.

On January 29, 1986 Ms. Johnson telephoned Mr. Mayor and told him that Mr. Cooney and his family lived in Baroil, Wyoming; had permission from the Department to be there;, and that Mr. Cooney had been in contact with her office during October and November of 1985. Mr. Mayor then telephoned Mr. White and relayed those facts to him. Despite this information, Mr. White reiterated his request that Mr. Mayor draft a petition to revoke Mr. Cooney's probation. Mr. Mayor followed Mr. White's instructions and prepared a document entitled "Petition for Revocation of Probation and Bench Warrant" dated January 29, 1986. In that document, and despite his contrary knowledge, Mr. Mayor swore under oath that Mr. Cooney changed his address without the Department's permission and failed to maintain contact with the Department after he moved. Mr. Mayor then forwarded the petition to Mr. White, who

presented it to the district court for the Fifth Judicial District, Park County, Wyoming. Based upon the petition, the district court issued a bench warrant for Mr. Cooney's arrest on February 7, 1986.

On February 10, 1986, Mr. Cooney sent a letter to Tracy Reinke, the probation officer in Rawlins, Wyoming, in an effort to comply with the terms of his probation. Numerous contacts between Mr. Cooney and Ms. Reinke occurred during February and March 1986. In early March, Mr. Cooney requested permission from Ms. Reinke to move to Glasgow, Montana, to accept permanent employment. On March 11, 1986, Ms. Reinke sent Mr. Cooney written permission to move to Montana. Having received his permission, the Cooneys packed their belongings and prepared to move to Montana. On March 15, 1986, a highway patrol officer stopped Mr. Cooney, his wife and child, and arrested him pursuant to the bench warrant issued upon the false information provided to the

district court by Mr. Mayor and Mr. White. Mr. Cooney was taken to the Park County jail in Cody, Wyoming, while Mrs. Cooney and their child were left stranded in Baroil with all of their possessions.

Mr. Cooney remained in the Park County jail until April 21, 1986, when the district court released him after denying the petition to revoke his probation. During his incarceration, Mr. White and Mr. Mayor did nothing to inform the district court of their knowledge concerning Mr. Cooney's compliance with the terms of his probation. They also did nothing to help get Mr. Cooney out of jail. In fact, during the time that Mr. Cooney was incarcerated, an attorney with the Park County public defender's office requested that Mr. Cooney be released from jail until a hearing could be held to determine the accuracy of the information underlying the arrest warrant. Mr. White refused to honor that request.

ARGUMENT

A. There is a conflict between the decisions of the United States Courts of Appeals and the Wyoming Supreme Court on whether the function performed by Respondent in this case is entitled to absolute or qualified immunity from liability under 42 U.S.C. § 1983.

The federal question presented to the Wyoming Supreme Court, and which the Petitioners ask this Court to review, is whether under the facts set forth above, Respondent Chris J. White is entitled to absolute immunity from liability under 42 U.S.C. § 1983. The cornerstone of this area of the law is this Court's opinion in Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). In Imbler, this Court considered whether a state prosecuting attorney who was acting "within the scope of his duties in initiating and pursuing a criminal prosecution" (Id. at 424 U.S. 410, 96 S.Ct. 984, 47 L.Ed.2d 128) was subject to liability under 42 U.S.C. § 1983 for depriving the criminal defendant of his constitutional rights. This Court

considered the common law of prosecutorial immunity and said:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of a prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by public trust.

Id. at 424 U.S. 422 & 423.

The Court determined that the same considerations required, under appropriate circumstances, that prosecutors have absolute immunity from liability under Section 1983. In so deciding, however, this Court was very careful to limit the absolute immunity to those instances where the prosecutor was acting within the course and scope of his employment in initiating and prosecuting criminal cases, i.e., where the prosecutor acted as an advocate for the

state. This Court said:

> It remains to delineate the boundaries of our holding. As noted, supra. at 416, the Court of Appeals emphasized that each of respondent's challenged activities was an "integral part of the judicial process." 500 F2d, at 1302. The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases, in its Circuit and in some others, which hold that a prosecutor engaged in certain investigative activities enjoys not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to a policeman's. See, Pierson v. Ray, 386 US at 557, 18 L Ed 2d 288, 87 S Ct 1213. We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. We

> hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.

Id. at 424 U.S. 430 & 431.

In Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), this Court expanded the ruling in Imbler to provide absolute immunity to federal officials who acted as prosecutors and judges in administrative proceedings. In doing so, this Court again stressed that the immunity arose from the function being performed, rather than the title or position of the officer involved. Id. at 438 U.S. 512.

This Court again considered how far to extend absolute immunity in Cleavinger v. Saxner, 474 U.S. 193, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985). In Cleavinger, the question was whether members of a federal prison discipline committee were entitled to absolute immunity from liability under Section 1983. This Court reviewed the

history of absolute immunity, and again stressed that the test for absolute immunity is a functional test. The Court said:

> The Court has said that "in general our cases have followed a 'functional' approach to immunity law" [quoting Harlow v. Fitzgerald, 457 U.S. at 810, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982)]. "[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant." Briscoe v. LaHue, 460 US, at 342, 75 L Ed 2d 96, 103 S Ct 1108. Absolute immunity flows not from rank or title or "location within the Government," Butz v. Economou, 438 US, at 511, 57 L Ed 2d 895, 98 S Ct 2894, but from the nature of the responsibilities of the individual official.

Id. at 474 U.S. 201.

Since the test is a functional test, it is first important to determine which activities of Respondent White are the subject of the Petitioners' complaint. The Petitioners do not complain about the decision to have a court review the facts, and determine whether Mr. Cooney had

complied with the terms of his probation. Implementing that decision, however, clearly did not demand that Mr. Cooney be arrested and detained in jail without bail or preliminary hearing for thirty-eight days. (See footnote 7 to dissent of Justice Urbigkit, Appendix at p. 113-116).

Nor do the Petitioners complain about the evidence presented at the hearing on the petition to revoke, or the manner in which Respondent White presented the State's contention that Mr. Cooney's probation should be revoked. Decisions in that regard are truly advocatory in nature and probably do deserve the protection of absolute immunity under this Court's decisions.

The lesson of Imbler and in progeny, however, in that the same public official may be entitled to absolute immunity in performing one activity, and only qualified immunity in performing another. The activity which the Petitioners contend gives rise to Respondent White's liability is the

decision that caused a perjured petition to be prepared and used to obtain a warrant for Mr. Cooney's arrest, and having him arrested and detained for thirty-eight days without bail or preliminary hearing.

That activity is akin to activities that police officers perform every day, and is, in the words of this Court, entitled to "only a good-faith defense comparable to the policeman's" Imbler v. Pachtman, supra at 424 U.S. 430.

In considering whether to grant this Petition for a Writ of Certiorari, it is important to note that, under Wyoming law, actions jointly taken by Mr. White (the deputy county attorney) and Mr. Mayor (the probation officer) could have been taken by either of those state officials alone. [1]

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1 Under both Federal and Wyoming law, however, neither of those public officials are entitled to cause a probationer to be detained without some hearing in the nature of a preliminary hearing to determine whether there is probable cause that the arrested probationer has committed acts which would constitute a violation of the condition of probation. Such a hearing must be conducted before someone not directly involved in the case, and "at or reasonably near the place of the

(See the opinion of the Wyoming Supreme Court, appendix at 62 and 63, Gronski v. State, 700 P.2d. 777, 778 (Wyo. 1985); Minchew v. State, 685 P.2d 30, 31 (Wyo. 1984); Weisser v. State, 600 P.2d 1320, 1323 (Wyo. 1979); Smith v. State, 598 P.2d 1389, 1390 (Wyo. 1979); Knobel v. State, 576 P.2d 941, 943 (Wyo. 1978); and Wyo. Stat. § 7-13-408 (Supp. 1987).

Since it is the function, and not the position or status that governs, in order to determine whether the decision of the Wyoming Supreme Court conflicts with decisions from the United States Courts of Appeals on this question, it is necessary to look to all decisions concerning the level of immunity available to those public officers who perform the activity of causing a probationer or parolee to be arrested and detained while waiting for a final decision

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alleged" violation or arrest "and as promptly as convenient after arrest." Morrissey v. Brewer, 408 U.S. 471, 484, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). See also Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d. 656 (1973) and Wyo. Stat. 7-13-408 (Supp. 1987).

on whether to revoke probation or parole. In considering the cases brought against both prosecuting attorneys and probation or parole officers, it is apparent that there is a conflict on this question between the United States Courts of Appeals, and that the decision of the Wyoming Supreme Court conflicts with some of those decisions.

The Wyoming Supreme Court relied on Harris v. Menendez, 817 F.2d 737 (11th Cir. 1987); Allen v. Thompson, 815 F.2d 1433 (11th Cir. 1987); and Hamilton v. Daley, 777 F.2d 1207 (7th Cir. 1985) to support its decision that Respondent White was entitled to absolute immunity under the facts of this case. (Although the Petitioners question whether, under a proper functional analysis, those cases really support the decisions of the Wyoming Supreme Court, it is not appropriate to consider that question in detail in this petition.) The Wyoming Supreme Court also cited, however, three cases with facts very similar to the case at

bar, all relating to the immunity afforded to a probation or parole officer, where it was determined that only qualified immunity was available for performing the precise function performed by Respondent White and Mr. Mayor in this case.

In Ray v. Pickett, 734 F.2d 370 (8th Cir. 1984) the Court noted that probation officers might be entitled to absolute immunity when performing some "adjudicatory or prosecutional functions", while other functions "more administrative, supervisory, or investigative in nature, may warrant only a qualified immunity." Id. at 372. The Court, therefore, limited its decision to "the immunity afforded a federal probation officer's action in filing a report with the United States Parole Commission to secure a parole violator's warrant." Id. (The plaintiff alleged that the probation officer had intentionally falsified these reports. The allegation was, therefore, almost identical to the Petitioner's allegation

that Respondent White requested and used a perjured petition to obtain a warrant for Mr. Cooney's arrest.)

In determining that the probation officers were only entitled to qualified immunity, the Court noted this Court's admonition in Harlow v. Fitzgerald, 457 U.S. 800, 811, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) that absolute immunity for judicial functions "has extended no further than its justification would warrant." Id. at 373.

In Galvan v. Garmon, 710 F.2d 214 (5th Cir. 1983) cert. denied. 466 U.S. 949, 104 S.Ct. 2150, 80 L.Ed.2d 536 (1984), the Fifth Circuit held that only qualified immunity was available to a probation officer who prepared a motion to revoke probation and caused the probationer to be arrested in the mistaken belief that the probationer had been arrested for driving while intoxicated. The Fifth Circuit held that these activities, which are analogous to but less egregious than those of Respondent White in

this case, did not present the sort of "special functions or constitutional status [which] requires complete protection from suit." Id. at 216 quoting Harlow, supra at 457 U.S. 807.

Finally, in Wolfel v. Sanborn, 691 F.2d 270 (6th Cir. 1982) cert. denied 459 U.S. 1115, 103 S.Ct. 751, 74 L.Ed.2d 969 (1983), this Court had vacated the first decision of the Sixth Circuit Court of Appeals [Sanborn v. Wolfel, 458 U.S. 1102, 102 S.Ct. 3476, 73 L.Ed.2d 1363 (1982)] for reconsideration in light of its decision in Harlow concerning the test to be applied in determining qualified immunity. On remand, the Sixth Circuit decided that parole officers who arrested and imprisoned the plaintiff for twenty-seven days without holding the required preliminary hearing were entitled to only a qualified immunity. It is, of course, precisely the same activity of Respondent White which gives rise to one of the Petitioners' claims in this case.

It is submitted, therefore, that if the United States Courts of Appeals' cases relied upon by the Wyoming Supreme Court actually support its decision, there is a conflict between the Circuits as to the level of immunity afforded to a public official performing the activities that were the subject of the Petitioners' complaint. If those cases do not support that decision, then the Wyoming Supreme Court's decision conflicts with all of the applicable decisions of the United States Courts of Appeals.

B. The Petition presents an important question of federal law which has not been, but should be, settled by this Court.

Obviously, the Petitioners believe that the violation of their constitutional rights were so serious as to warrant this Court's review of the decision of the Wyoming Supreme Court. More importantly, this case presents an important federal question upon which this Court has expressly reserved judgment. Martinez v. California, 444 U.S.

277, 285 n. 11, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). As a result, the United States Courts of Appeals have rendered decisions which the Wyoming Supreme Court took to mean that prosecutors are entitled to absolute immunity for the precise activities which other Courts of Appeals have decided gave probation officers only qualified immunity. That conflict should be resolved.

Equally important is the fact that the decision below extends absolute immunity far beyond the advocatory function found in Imbler. If the function being performed is the true test, it is difficult to understand why a prosecutor should have absolute immunity when a police officer or a probation officer, performing precisely the same act and achieving precisely the same result, would have only a qualified immunity. It is time for this Court to reiterate the limitation on granting public officials absolute immunity for deliberately depriving citizens of their most cherished

constitutional rights.

V. CONCLUSION

Based upon the foregoing, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the decision of the Wyoming Supreme Court and resolve the conflict concerning what level of immunity is properly available to public officials who engage in the activity complained of in this case.

RESPECTFULLY SUBMITTED this 17th day of July, 1990.

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